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04 UNITED STATES DISTRICT COURT
05 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 LARRY GENE HEGGEM,) CASE NO. C08-0070-MJP
07 Plaintiff,)
08 v.) REPORT AND RECOMMENDATION
09 JAMES CONGDON,)
10 Defendant.)
11 _____)

12 INTRODUCTION AND SUMMARY CONCLUSION

13 This is civil rights action brought pursuant to 42 U.S.C. § 1983. Plaintiff Larry Heggem
14 filed this action while incarcerated at the Monroe Corrections Complex (“MCC”) in Monroe,
15 Washington. He alleges in his complaint that the lone defendant, James Congdon, D.O., denied
16 him his constitutional right to adequate medical care. Defendant Congdon now moves for
17 summary judgment. Plaintiff has filed both a response and an objection to defendant’s motion¹,

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19 ¹ Plaintiff asserts in both his response and in his objection that defendant’s summary
20 judgment motion is premature because discovery has not yet been completed. Plaintiff has also
21 filed a motion seeking an extension of the discovery and dispositive motion filing deadlines.
22 Pursuant to Fed. R. Civ. P. 56(b), a party against whom relief is sought may move for summary
judgment at any time. Thus, defendant’s motion cannot be deemed premature. While the Court
may, in accordance with Fed. R. Civ. P. 56(f), grant a continuance of a pending summary
judgment motion to enable a party to conduct the discovery necessary to properly oppose the
motion, plaintiff has not persuaded the Court that such a continuance is warranted in this case.

01 and defendant has filed a reply brief in support of his motion. This Court, having reviewed
02 defendant's motion, all briefing of the parties with respect thereto, and the balance of the record,
03 concludes that defendant's motion for summary judgment should be granted, and this action
04 should be dismissed with prejudice.

05 FACTS

06 At all time relevant to this complaint, plaintiff was a prisoner in the custody of the
07 Washington Department of Corrections. On June 18, 2004, plaintiff was admitted to the Valley
08 General Hospital in Monroe, Washington with a history of severe abdominal pain, severe
09 constipation, and weight loss. (*See* Dkt. No. 31-2 at 2.) An abdominal CT scan conducted
10 following his admission to the hospital revealed a significantly enlarged spleen containing an
11 abnormal, low-density mass. (*Id.*) Dr. Congdon, who was first asked to see plaintiff on June 22,
12 2004, suspected probable splenic lymphoma, along with acute pancreatitis and chronic
13 constipation caused by extrinsic compression of the pancreas and colon by the enlarged spleen.
14 (*Id.*)

15 Dr. Congdon recommended an emergency splenectomy, or removal of the spleen, in order
16 to obtain a tissue diagnosis and to relieve compression on the pancreas and colon. (*Id.*) Dr.
17 Congdon consulted with a general surgeon who concurred with his recommendation, and the
18 surgeon attempted the splenectomy on June 25, 2004. (*Id.*) After entering plaintiff's abdomen,
19 the surgeon apparently determined that the mass in plaintiff's spleen was too large and/or too
20 invasive to remove. (*Id.*) However, biopsies were taken of the spleen and the retroperitoneal

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22 Accordingly, plaintiff's request for an extension of the discovery and dispositive motion filing
deadlines (Dkt. No. 38) is DENIED.

01 nodes, and the pathology report revealed a diffuse large B-cell lymphoma. (*Id.* at 3.)

02 Plaintiff was returned to MCC after achieving a stable post-operative condition. (*Id.*) On
03 July 7, 2004, plaintiff was returned to Dr. Congdon's clinic at Valley General Hospital. (*Id.*)
04 Plaintiff was admitted to the hospital and, according to Dr. Congdon, plaintiff received the first
05 of six scheduled cycles of chemotherapy on that date.² (Dkt. No. 31-2 at 3.) By the time of his
06 scheduled fourth cycle of chemotherapy on September 8, 2004, plaintiff's hematocrit level was
07 significantly decreased and he was therefore started on weekly Procrit injections. (*Id.* at 4.)
08 Plaintiff received one Procrit injection at Dr. Congdon's office and apparently received three
09 subsequent weekly injections at MCC. (*Id.*) The Procrit treatment successfully raised plaintiff's
10 hematocrit to an acceptable level. (*Id.*)

11 Plaintiff received his final cycle of chemotherapy on October 27, 2004. (*Id.*) Thereafter,
12 post-treatment CT scans were performed on plaintiff's thorax, abdomen, and pelvis in order to
13 determine plaintiff's response to therapy. (*Id.* at 5.) Plaintiff was scheduled to see Dr. Congdon
14 for a follow-up evaluation on November 24, 2004, apparently to discuss the results of these scans.
15 (*Id.*) However, plaintiff became involved in a dispute with the transporting corrections personnel
16 which disrupted the clinic and the appointment was cancelled. (*Id.*)

17 The follow-up appointment was apparently rescheduled as Dr. Congdon saw plaintiff on
18 December 30, 2004, at which time he discussed with plaintiff the results of the CT scans.
19 According to Dr. Congdon, he advised plaintiff at that appointment that the abnormality in his
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21 ² Plaintiff contends that he received his first cycle of chemotherapy while he was still
22 sedated and recovering from his surgery on June 25. Neither party has provided the Court with
any medical records which might substantiate their respective assertions regarding this fact.

spleen had decreased in size but was still present and required further evaluation. (*Id.*)

On February 17, 2005, plaintiff underwent a PET CT scan, apparently at Dr. Congdon's direction, which revealed that plaintiff was in complete clinical remission. (*Id.* at 5-6.) Dr. Congdon saw plaintiff for a final time on February 22, 2005. (*Id.* at 5.) At that appointment, Dr. Congdon advised plaintiff that no further therapy was needed at that time but that close follow-up was required. (*Id.* at 6.) Plaintiff advised Dr. Congdon that he was scheduled to be released from MCC a week later and Dr. Congdon indicated a willingness to continue treating plaintiff at his clinic. (Dkt. No. 31-2 at 6.) Plaintiff never returned to Dr. Congdon's clinic after the February 22, 2005, visit. (*Id.*)

DISCUSSION

Plaintiff alleges in his complaint that he was denied constitutionally adequate medical care by Dr. Congdon. Specifically, plaintiff asserts that Dr. Congdon failed to obtain his informed consent before administering chemotherapy and that Dr. Congdon coerced him into continuing with the treatment after he had expressed a desire to stop treatment and after a CT scan showed no more tumor mass. Plaintiff also asserts that Dr. Congdon ignored his complaints that the Procrit injections were causing severe foot and leg pain, that Dr. Congdon disregarded possible side effects of Procrit use, and, that Dr. Congdon deliberately ignored the protocol for using Procrit at one point during plaintiff's chemotherapy treatment. Plaintiff contends that the extended use of Procrit resulted in permanently cramped toe joints.

Finally, plaintiff appears to assert that Dr. Congdon discriminated against him when he cancelled plaintiff's November 24, 2004, appointment, and that Dr. Congdon acted improperly when he refused to show plaintiff the latest CT scans at plaintiff's February 22, 2005, appointment

01 and lied to him about being in remission.

02 Defendant, in his pending summary judgment motion, argues that he is entitled to judgment
03 as a matter of law as to plaintiff's medical malpractice claim because plaintiff has not met the
04 certificate-of-merit and 90-day notice requirements of RCW 7.70. Defendant further argues that
05 plaintiff does not have the requisite expert to sustain his medical malpractice claim. As to
06 plaintiff's § 1983 claim, defendant argues that the evidence does not establish a genuine issue of
07 material fact as to his deliberate indifference. Finally, defendant argues that all of plaintiff's claims
08 are barred by the applicable statute of limitations.

09 While defendant construes plaintiff's complaint as presenting claims of medical malpractice
10 as well as a claim under § 1983, it appears that plaintiff's intent was to allege only claims under
11 § 1983. (*See* Dkt. No. 37 at 3.) Accordingly, the Court need not address defendant's arguments
12 regarding plaintiff's failure to comply with state law requirements for the presentation of medical
13 malpractice claims. The Court will, however, address defendant's remaining arguments as
14 necessary.

15 Summary Judgment

16 Summary judgment is appropriate when, viewing the evidence in the light most favorable
17 to the nonmoving party, there exists "no genuine issue as to any material fact" such that "the
18 moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact
19 is a fact relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477
20 U.S. 242, 248 (1986). Genuine issues of material fact are those for which the evidence is such that
21 "a reasonable jury could return a verdict for the nonmoving party." *Id.*

22 In response to a properly supported summary judgment motion, the nonmoving party may

01 not rest upon mere allegations or denials in the pleadings, but must set forth specific facts
02 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the
03 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of
04 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling on
05 summary judgment, the court does not weigh evidence to determine the truth of the matter, but
06 “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547,
07 549 (9th Cir. 1994).

08 Statute of Limitations

09 Defendant argues that the instant action is barred by the statute of limitations. (Dkt. No.
10 31 at 17-19.) Because plaintiff asserts claims under § 1983, the Washington statute of limitations
11 governing personal injury actions applies. *See Wilson v. Garcia*, 471 U.S. 261 (1985).
12 Accordingly, the applicable limitations period is three years. RCW 4.16.080(2). Although state
13 law provides the applicable limitations period, federal law determines when the cause of action
14 accrues. *See Tworivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1998). And, “[u]nder federal law,
15 a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of
16 the action.” *Id.*

17 The record reflects that plaintiff was diagnosed with lymphoma in late June 2004, and that
18 he received chemotherapy treatments from early July 2004 until late October 2004. It appears
19 clear that plaintiff had reason to know of any injury arising out of the manner in which Dr.
20 Congdon managed and conducted plaintiff’s chemotherapy treatment well over three years prior
21 to January 16, 2008, the date plaintiff filed the instant action. Accordingly, plaintiff’s claims that
22 Dr. Congdon failed to obtain his informed consent before administering chemotherapy and that

01 Dr. Congdon coerced him into continuing with the treatment are barred by the statute of
02 limitations.

03 Plaintiff's claims regarding the administration of Procrit are also barred by the statute of
04 limitations. The record reflects that plaintiff received Procrit injections for a period of only four
05 weeks beginning in early September 2004. According to plaintiff's own assertions, his concerns
06 regarding the alleged side effects of the Procrit were immediate, and he attempted, in vain, to get
07 Dr. Congdon to respond to those concerns. It therefore appears clear that plaintiff had reason to
08 know of any injury arising out of the administration of the Procrit by late September or early
09 October of 2004, well over three years prior to the date plaintiff filed the instant action.

10 Finally, plaintiff's claim that Dr. Congdon discriminated against him when he refused to
11 see plaintiff on November 24, 2004, is barred by the statute of limitations because that claim
12 clearly accrued over three years prior to the date plaintiff filed the instant civil rights action.

13 In summary, all of plaintiff's claims concerning the administration of chemotherapy, the
14 administration of Procrit, and the refusal of Dr. Congdon to see plaintiff on November 24, 2004,
15 are barred by the statute of limitations and plaintiff's complaint should therefore be dismissed, with
16 prejudice, as to those claims.

17 Eighth Amendment

18 The only claims alleged by plaintiff which are not clearly barred by the statute of limitations
19 are those arising out of his appointment with Dr. Congdon on February 22, 2005. Plaintiff
20 contends that, at that appointment, Dr. Congdon failed to show him the images from his latest CT
21 scan and lied to him about any remaining tumor mass.

22 The Eighth Amendment imposes a duty upon prison officials to provide humane conditions

01 of confinement. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This duty includes ensuring that
02 inmates receive adequate medical care. *Id.* In order to establish an Eighth Amendment violation,
03 a prisoner must satisfy a two-part test containing both an objective and a subjective component.
04 The Eighth Amendment standard requires proof that (1) the alleged wrongdoing was objectively
05 "harmful enough" to establish a constitutional violation; and (2) the prison official acted with a
06 sufficiently culpable state of mind. *Farmer v. Brennan*, 511 U.S. at 834. The objective
07 component of an Eighth Amendment claim is "contextual and responsive to 'contemporary
08 standards of decency.'" *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)(quoting *Estelle v. Gamble*,
09 429 U.S. 97, 103 (1976)). The state of mind requirement under the subjective component of the
10 Eighth Amendment standard has been defined as "deliberate indifference" to an inmate's health or
11 safety. *Farmer v. Brennan*, 511 U.S. at 834.

12 Plaintiff makes no showing that Dr. Congdon's alleged failure to show him the images of
13 his final CT scan caused him any injury whatsoever. Accordingly, that claim fails to implicate
14 Eighth Amendment concerns. Plaintiff's claim that Dr. Congdon lied when he told plaintiff there
15 were no signs of any more tumor mass also fails to implicate Eighth Amendment concerns because
16 there is simply no evidence in the record that Dr. Congdon ever misled plaintiff regarding his
17 medical condition.

18 Dr. Congdon states in his declaration that the PET CT scan performed on February 17,
19 2005, revealed no residual lymphoma and, as a result plaintiff was deemed to be in complete
20 clinical remission. (Dkt. No. 31-2 at 6.) Dr. Congdon further states that while plaintiff never
21 returned to him for follow-up treatment, plaintiff did seek follow-up treatment from Dr. Oliver
22 Batson at The Everett Clinic, and Dr. Batson concurred with Dr. Congdon's impression that

01 plaintiff was in clinical remission. (*Id.*) If plaintiff has evidence that these conclusions were
02 incorrect, and deliberately so, he has not revealed it.

03 As plaintiff fails to establish any violation of his Eighth Amendment rights, Dr. Congdon
04 is entitled to summary judgment as to plaintiff's claims arising out of the February 22, 2005,
05 follow-up appointment. Plaintiff's complaint should therefore be dismissed, with prejudice, as to
06 those claims.

07 CONCLUSION

08 For the reasons set forth above, this Court recommends that defendant's motion for
09 summary judgment be granted and that this action be dismissed with prejudice. A proposed order
10 accompanies this Report and Recommendation.

11 DATED this 2nd day of September, 2008.

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13 Mary Alice Theiler
14 United States Magistrate Judge
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